Ontario

Confidentiality of Worker Health Records

Health and Safety Guidelines

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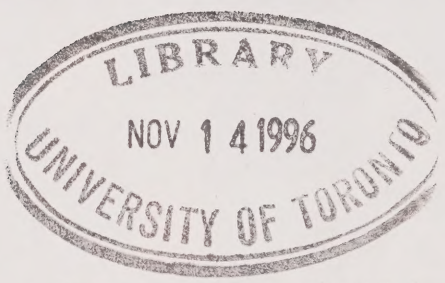


Confidentiality of Worker Health Records

This guideline has been prepared to help employers, workers, supervisors, members of joint health and safety committees and occupational health personnel meet the requirements regarding confidentiality of worker health records.

The advice contained in the guideline is the interpretation of the various legislative requirements by Ministry of Labour employees. This advice is not binding on the ministry or the Ontario government but is intended to give general answers to possible questions. It is being used by ministry staff in the administration of the *Occupational Health and Safety Act* and its regulations.

The ultimate answers to questions regarding the interpretation and application of legislative provisions will be given by the courts when disputes concerning the interpretation or application of provisions arise.

The *Occupational Health and Safety Act* is administered by the ministry's Occupational Health and Safety Branch and by occupational health and safety staff in the ministry's local offices. See "For More Information" on page 11.

Introduction

Making sure that worker health records are kept confidential is fundamental to a successful occupational health service. Honest communication between a worker and a health professional is possible only when the worker is sure that personal information will be maintained in confidence. Without this trust, health professionals are limited in their ability to assess the health of workers and give them the most appropriate care.

In particular, when a health professional giving care to a worker is employed by, or under contract to, the worker's employer, questions about the handling of the worker's health records can arise.

This guideline answers commonly asked questions on the appropriate handling of worker health records and considers both regulatory requirements and current accepted practice. It will be useful to employers, workers, supervisors, members of joint health and safety committees and occupational health personnel.

Regulatory Requirements in Ontario

A) The *Regulated Health Professions Act, 1991*

Many health professionals have obligations under this Act as well as in the common law to maintain health records in confidence. Employers and workers should be aware of these obligations. In particular, occupational health professionals should advise all workplace parties of their responsibility to protect the privacy of worker health records.

B) The *Occupational Health and Safety Act*

Two subsections of the *Occupational Health and Safety Act* (the OHSA) deal with confidentiality of worker health records:

- Subsection 63(1)(f) of the OHSA prohibits disclosure by any person of any information obtained in any medical examination, test or x-ray of a worker made or taken under the OHSA except in a form that would prevent identification of a particular person or case.

  This prohibition pertains only to medical examinations, tests or x-rays made or taken under the OHSA. Examples would be tests and examinations done for the medical surveillance outlined in the designated substance regulations.

- In 1991 subsection 63(2) of the OHSA was amended to restrict access by employers to worker health records without the worker's written consent. The intent is protection of the privacy of workers with respect to all information kept in their health records.

Questions and Answers

1) How does subsection 63(2) of the OHSA restrict employer access to worker health records?

Subsection 63(2) states:

> "No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a worker health record concerning a worker without the worker's written consent."

Except for the conditions set out in this subsection, the employer must obtain the worker's written consent before seeking to gain access to any information in a worker's health record. "Seeking to gain access" includes asking for the use of a worker health record, collecting health information or enquiring about information contained in the record.

The employer must ensure that all persons who act on behalf of the employer, including all persons with managerial and supervisory duties, comply with this section.

2) What is meant by the term "worker health record" in subsection 63(2)?

A "worker health record" includes information collected in the course of evaluating the health of a worker or providing health care to a worker. The term is not restricted to records collected under the OHSA.

Examples of information that could be part of a "worker health record" are:

- physicians' or nurses' notes;
- pre-placement and periodic medical examination and health assessment data;
- results of clinical tests, e.g. x-ray, blood analysis and lung function tests;
- results of screening tests, e.g. audiometric, tuberculin and vision tests; and
- other reports from health professionals on the health of a worker.

Any questions about information falling into categories not given above should be reviewed case by case. Items usually considered part of a health record in the ordinary practice of a health professional would be part of the "worker health record".

3) If access to worker health records is restricted to a "health professional", who is considered to be a health professional?

The *Regulated Health Professions Act* contains a list of the health care providers regulated under it. Health professionals are generally considered to be individuals who provide direct health care to a worker or who evaluate the health of a worker, whether in the workplace or outside it.

Direct health care may be provided to a worker by the family physician, physicians practising medical specialties, including occupational medicine, or an occupational health nurse (who often provides care right in the workplace). With the development of occupational health programs, other health professionals may be directly involved in workplace health and rehabilitation programs, both in the workplace and outside it. These include physiotherapists, occupational therapists, psychologists, audiologists and others.

4) Who should control worker health records?

To ensure compliance with the restrictions on access set out in subsection 63(2) (see Question 1), health records should be controlled by the occupational health team involved in providing direct care to the individual.

5) How should access to worker health records of laid-off and terminated workers be handled?

Access to health records of laid-off or terminated workers should be handled in the same confidential manner as access to health records of currently employed workers.

6) How should information from worker health records be handled when it is to be used in health studies?

If information is to be taken from worker health records for health studies, appropriate procedures must be in place to make sure that confidentiality is maintained. For example, this might include removing all personal identifiers. In other words, the information released must contain nothing that could identify it with a particular person or case.

7) What should employers and workers know about written consents authorizing the release of health information under subsection 63(2) of the OHSA?

First, intimidation or coercion must not be used when seeking written consent for access to a worker's health record. A recent decision by the Ministry of Labour's Office of Adjudication is relevant. It concerned an appeal involving alleged coercion of a worker to sign a written consent for access to his health record. The decision reaffirms that intimidation cannot be used to obtain consent for access to worker health records.

Second, the written consent does not have to cover all the information in the health record. For example, the consent may be limited to information about a particular illness or injury. It may also be limited to information about a certain period of time. Workers should be aware that they can specify what information is to be released from their health records and to whom it is to be released.

8) May employees obtain information from their own health records?

Current trends favouring the right of individuals to receive information about themselves were noted in a recent Supreme Court decision supporting the patient's right to examine his or her medical record.

Employers should have a policy in place that describes procedures under which employees can have access to their own health records. Note that regulations under the *Regulated Health Professions Act* may have specific requirements for providing information to a worker.

Another important reason why employees have access to their own records is to ensure accuracy. Institutions subject to freedom of information legislation are required to provide this access specifically for the purpose of correcting errors.

9) Does the employer have access to the records of first aid treatments given on the job?

The Regulation Respecting First Aid Requirements, made under the *Workers' Compensation Act*, requires that the employer keep a record of the date, time and nature of each first aid treatment given in all cases of injury on the job (R.R.O. 1101, section 5).

When the record of the first aid treatment is made by a health professional and added to the worker's health record, only the first aid information may be given to the employer without the worker's written consent. Access by the employer to any other information in the health record requires the worker's written consent, as outlined above.

10) What information can an employer expect to receive from a health professional?

A health professional may conduct pre-placement or periodic medical or health assessments as part of the company's occupational health program (for example, as part of medical surveillance regarding designated substances). In some cases, a health professional may also conduct a medical assessment to determine a worker's ability to return to work following illness or injury.

The information obtained during such assessments is part of the worker's health record and must be kept confidential.

However, the health professional could provide the employer with a report on the worker's fitness to perform the essential duties of a particular job and any limitations of the worker that pertain to the performance of the job. For such a report to be made, the employer must communicate the requirements of the job to the health professional.

Note that recent amendments to the *Workers' Compensation Act* require that a health professional have the worker's consent before releasing a report to the employer and the board. Any regulations applicable to the report must also be satisfied.

In another recent development, the Canadian Medical Protective Association has advised occupational physicians to obtain the worker's consent before providing employers with information on his or her fitness to return to work. (For further information, contact the CMPA.)

11) Does it matter whether the health professional conducting a medical or health assessment is acting on behalf of the employer or at request of the worker?

In either case, the obligations are as stated in answer to Question 10.

12) What is the status of information that a worker provides to the employer by giving him a note from a physician regarding absence from work or work limitations? Isn't this confidential?

As stated previously, information on a worker's health or disability may be provided to a third party, such as the employer, if the worker consents. If the worker freely gives the employer a note, the worker's action indicates consent to the employer's having the information in that note. For example, if the worker freely gives the employer a physician's note containing a medical diagnosis, the worker has consented to the employer's having that diagnosis.

Thus if workers do not wish to disclose certain medical information when giving the employer a physician's note, it is important that they make sure that the note contains only information about their ability to perform the job.

13) Do notification provisions under subsection 52(2) of the OHSA require the employer to have access to worker health records? Do they entitle the employer to have such access?

Briefly, the answer to both questions is no.

Under the notification provisions of subsection 52(2) of the OHSA, if a worker (or a former worker) or someone acting on behalf of a worker advises the employer that the worker has an occupational illness, or that a claim has been filed with the WCB, the employer is required to notify:

- the Ministry of Labour,
- the joint health and safety committee or a health and safety representative (if any), and
- the trade union (if any)

of the occurrence of the occupational illness. The employer must give this notification in writing within four days of being advised of the illness or WCB claim. The main purpose of this is to ensure that the employer takes steps to prevent the recurrence of the illness.

When a worker tells the employer that he or she has an occupational illness and states what happened to cause it, the employer's notification needs to give only this information, along with the other particulars required by regulations under the OHSA (see "Note" below). There is no requirement to include a medical diagnosis or a description of the illness.

Thus the employer is not required (or entitled) to have access to such information in the worker's health record under subsection 52(2).

Note: In addition to the requirements of subsection 52(2), regulations under the OHSA covering different workplace sectors specify information to be included in notifications of an occupational illness. These regulations include: O.Reg. 213/91 (construction); R.R.O. 854 (mining); O.Reg. 67/93 (health care); and R.R.O. 851 (industrial establishments).

14) In giving notice of occupational illness required under subsection 52(2) of the OHSA, should the employer provide a copy of the Workers' Compensation Board's "Employer's Report of Injury/Disease" (WCB Form 7)?

Employers should not use WCB Form 7 to comply with the notification requirements under subsection 52(2) of the OHSA. They must provide only the particular information prescribed in the regulations under the OHSA and must see that the information goes only to the appropriate party.

Many employers have submitted copies of WCB Form 7 to comply with notification requirements under the OHSA. However, both the provincial and municipal privacy legislation (the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*) prohibit the collection and disclosure of information unless it is specifically authorized by a particular statute and regulations under it. Form 7 contains considerably more personal information than is required in the notification requirements of the OHSA.

15) Do the privacy provisions set out in the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* prevent provincial or municipal employers from complying with the various notice obligations under the OHSA?

This question arises because the OHSA requires employers to disclose certain personal information, while the privacy legislation mentioned above seem to forbid disclosure.

More specifically, the OHSA's notice provisions require employers to share several categories of information about workers with the ministry, joint health and safety committees or health and safety representatives and trade unions (where applicable). These categories include personal information that would normally be restricted under the privacy legislation covering provincial and municipal employers.

However, under both the provincial and the municipal privacy legislation, disclosure of personal information is permissible if that disclosure is for the purpose of complying with another statute. Therefore, it is appropriate to disclose the information explicitly referred to in the OHSA and regulations under it. The disclosure of such information must, however, be in strict compliance with the disclosure provisions of the privacy legislation.

WCB Form 7 should no longer be used to satisfy the notice obligations.

16) How should worker health records be maintained?

It is the responsibility of the health professional to see that worker health records are maintained in confidence. The health professional must ensure that all staff who handle worker health records keep all information contained in them confidential.

When an occupational health professional is employed at the workplace, health records are generally maintained by him or her on site. When an occupational health service is provided to a company by an outside agency, it is the responsibility of the agency to maintain the health records.

Worker health records should not be maintained in the company's personnel files but in a separate filing system in a secure place.

If worker health information is stored electronically, access should be restricted by appropriate means. Procedures should be in place to protect the information from destruction and unauthorized alteration. The same principles for access, maintenance and disposition that apply to paper health records apply to electronically stored health records.

17) Should worker health records ever be sent by fax?

The use of facsimile (fax) transmission of worker health information is discouraged except when particular information is required for the immediate treatment of a worker. If worker health information must be sent by fax it should handled with special care. In particular, it is recommended that all personal identifiers be removed. A confidential means of identification should be used instead: for example, a file number or a registration number.

18) How long must worker health records be retained?

There are several regulatory requirements for retention of worker health records. Regulations being developed under the *Regulated Health Professions Act* will include requirements for record retention by health professionals. For further information on record retention, contact the appropriate professional regulatory body: i.e., the College of Nurses of Ontario, the College of Physician and Surgeons of Ontario, etc.

The designated substance regulations under the OHSA require worker medical and exposure records to be maintained, in a secure place, by the examining physician for whichever of the following periods ends later:

- forty years from the time the first entry in the record was made,

  or
- twenty years from the time the last entry in the record was made.

19) How should the disposition of worker health records be handled in the following cases?

Case A: The health records have been kept for the required period of time.

The health records may be either forwarded to the worker's physician, with the worker's consent, or destroyed in a manner that ensures confidentiality.

Case B: The examining physician or a successor is no longer able or willing to keep the health records required by designated substance regulations made under the OHSA.

The records must be forwarded to the Provincial Physician of the Ministry of Labour, who will store them in a secure place for the prescribed times.

Case C: A workplace either closes down or ceases to provide an occupational health service.

In either circumstance, options to consider include I to IV below. It should be noted that these options apply only to health records NOT made under the designated substance regulations of the OHSA.

The most acceptable option(s) for a workplace that is closing or no longer providing occupational health service should be selected after consultation with the health professionals and **with appropriate worker consent**.

Option I

Transfer the health records to an occupational health service at another location within the company. (The records would then be maintained by the health professional at that location).

Option II

Transfer the health records to an occupational health service or agency or to a health professional outside the company.

Option III

Transfer the health records to the worker or the worker's physician.

Option IV

Transfer the health records to a senior management official to be maintained in a secure place.

If this option is chosen, a letter of agreement should be signed by the health professional and by the senior manager outlining the manager's responsibility to maintain health records in a confidential manner. The letter of agreement should indicate that the manager will ensure that no worker health information will be accessed or released without the written consent of the worker except as provided for in subsection 63(2) of the OHSA.

20) What measures can be taken at the workplace to avoid misunderstanding about the handling of worker health records?

To avoid misunderstanding and conflict over the handling of worker health records, employers should develop a written policy on confidentiality of health records.

This policy should be developed in consultation with joint health and safety committees, worker health and safety representatives and occupational health personnel. It should describe the procedures for collection, maintenance, access and disposition to be followed by those responsible for maintaining the health records. The policy should be clearly communicated to all managers and employees.

Finally, since acceptable practice involving privacy obligations and confidentiality issues is constantly evolving, this policy should be periodically reviewed and, if necessary, revised to ensure that it reflects current practice.

For More Information

For more advice or information on the handling of worker health records, please contact a nurse or doctor who is on staff as a consultant at one of the following Ministry of Labour offices:

Central Area Office (Mississauga)
(905) 273-7800
Toll free: 1-800-268-2966

Eastern Area Office (Ottawa)
(613) 228-8050
Toll free: 1-800-267-1916

Hamilton/Niagara Area Office (Hamilton)
(905) 577-6221
Toll free: 1-800-263-6906

Kitchener District Office
(519) 885-3378
Toll Free: 1-800-265-2468

Northern Area Office (Sudbury)
(705) 670-7217
Toll free: 1-800-461-6325

Thunder Bay District Office
(807) 475-1691
Toll Free: 1-800-465-5016

Toronto Area Office (Scarborough)
(416) 314-5336

Western Area Office (London)
(519) 439-2210
Toll free: 1-800-265-1676

Please see the map "Ministry of Labour Service Areas" on the next page.

Southern Ontario

Eastern Area

Area Office
1. Ottawa

District Offices
2. Kingston
3. Peterborough

Satellite Office
4. Whitby

Hamilton/ Niagara Area

Area Office
11. Hamilton

District Office
12. Niagara
13. Halton

Toronto Area

Area Office
5. Scarborough

District Offices
6. Downtown Toronto
7. Rexdale

Western Area

Area Office
14. London

District Offices
15. Windsor
16. Kitchener

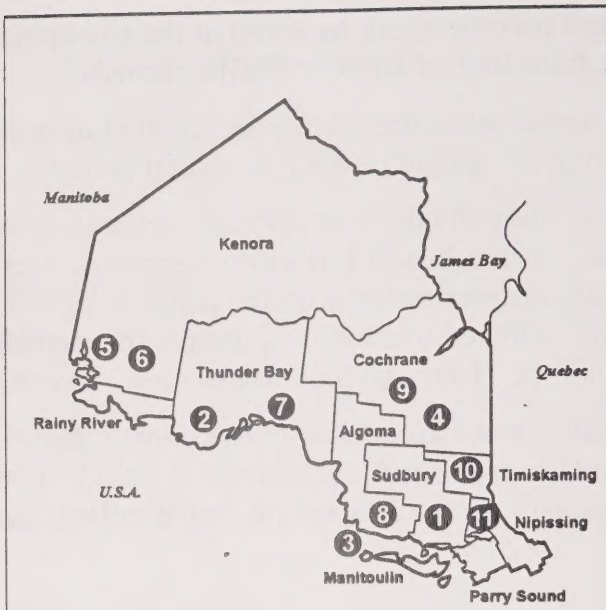
Satellite Office
17. Sarnia

Central Area

Area Office
8. Mississauga

District Offices
9. Barrie
10. Richmond Hill

Northern Ontario

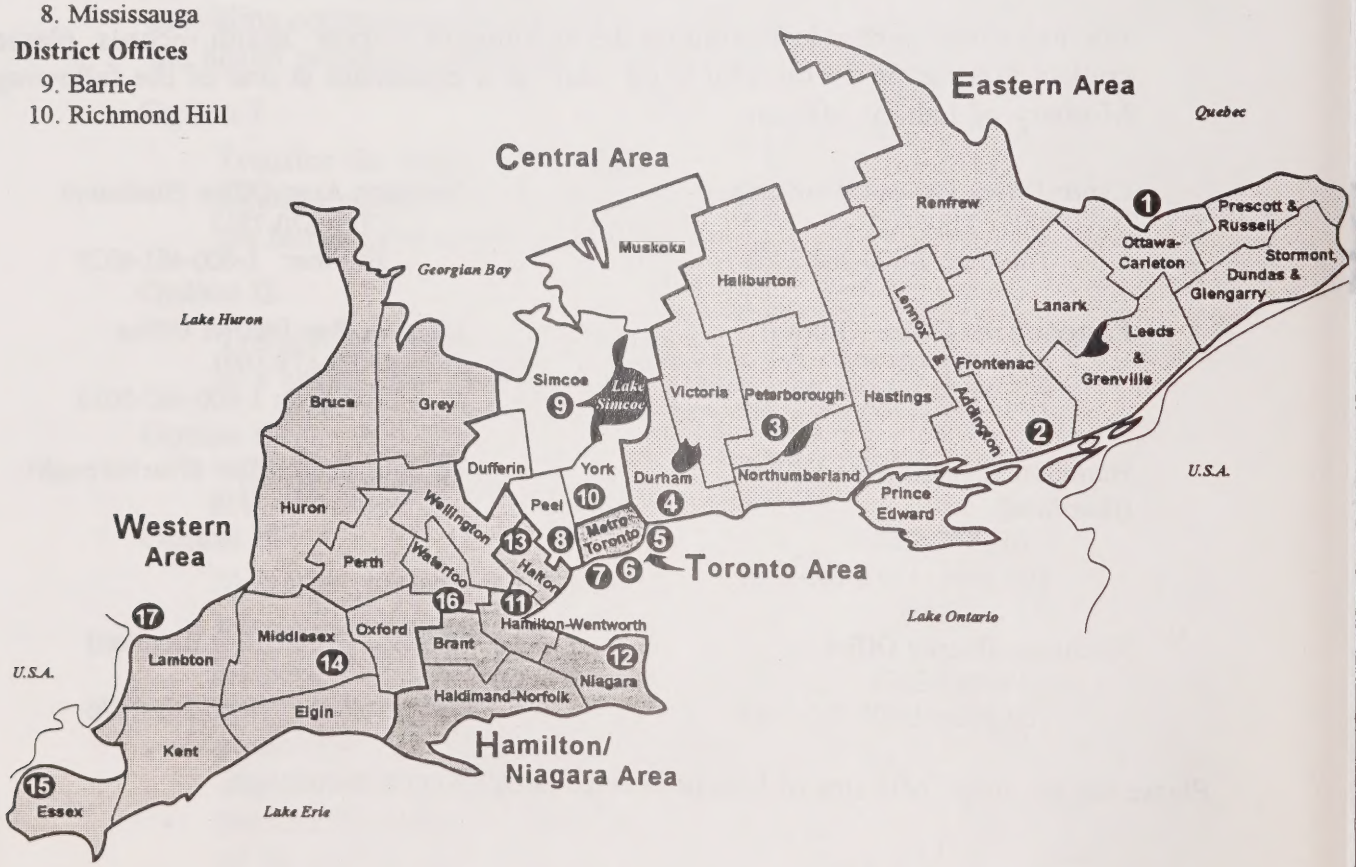


Northern Area

Area Office
1. Sudbury

District Offices
2. Thunder Bay
3. Saulte Ste Marie
4. Timmins

Satellite Offices
5. Kenora
6. Dryden
7. Marathon
8. Elliot Lake
9. Kapuskasing
10. Kirkland Lake
11. North Bay



Ministry of Labour Service Area

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